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IN THE UNITED STATES DISTRICT COURT

FOR THE

COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

JOHN BRADY BARRINEAU,  
Plaintiff,

vs.

PROMARINE TECHNOLOGY and  
CABRAS MARINE CORPORATION,  
Defendants.

CIVIL ACTION NO. CV05-0028

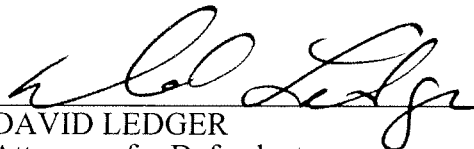
**DEFENDANT'S MOTION FOR  
SUMMARY JUDGMENT;  
MEMORANDUM IN SUPPORT  
THEREOF; DECLARATION OF DAVID  
LEDGER; EXHIBITS A-D;  
CERTIFICATE OF SERVICE:**

**HEARING: MAY 10, 2007  
TIME: 9:00 A.M.**

Defendant Cabras Marine Corporation ("Cabras") hereby moves this Court for summary judgment pursuant to Federal Rule of Civil Procedure 56. This motion is supported by the attached Memorandum of Points and Authorities and Exhibits A through D, the attached Declaration of David Ledger, and the records and files for this action.

DATED: Hagåtña, Guam, April 5, 2007.

CARLSMITH BALL LLP

  
DAVID LEDGER  
Attorneys for Defendant  
Cabras Marine Corporation

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

Plaintiff John Barrineau was at the time in question employed as a commercial diver by Pro Marine Technology. Mr. Barrineau's diving accident occurred when he was diving to clean the bottom of a vessel which was at the time anchored in Inner Apra Harbor, Guam. Mr. Barrineau settled his claims against with Pro Marine Technology for \$100,000. Subsequently, the Court ruled that Cabras Marine's cross claim against Pro Marine could not be maintained, and later approved the Barrineau-Pro Marine settlement as a good faith settlement.

Cabras Marine remains in the case as a defendant with Barrineau asserting a number of common law and admiralty claims against Cabras. Each claim, however, suffers from fatal flaws paramount among them being that Cabras Marine was not Barrineau's employer and did not exercise any control or right of control over any equipment, instrumentality or event which caused Barrineau harm. Neither Cabras Marine nor its vessel *M/V CAJUN* played the slightest part in causing Plaintiff's diving accident. The undisputed record clearly demonstrates that Barrineau's injuries were caused solely by Pro Marine Technology ("PMT"), his employer, when PMT's President, Kenneth Collard, admittedly turned off Barrineau's air supply on the mistaken belief that he was turning off the air supply to a diving mask which was not in use. In other words, Mr. Collard intended to turn off an air supply valve, just not the valve supplying air to Mr. Barrineau. The undisputed record demonstrates that Cabras had absolutely no role in causing what happened and was under no duty to prevent it. Rather, as all other parties have admitted, Cabras Marine had no involvement in the events leading to the errant shut-off of Barrineau's air supply. Two Cabras employees were present at the time of the events only because Cabras Marine's vessel *CAJUN* acted as a water taxi to transport PMT employees and their diving

1 equipment from the dock at Sumay Cove<sup>1</sup> to the dive site at Inner Apra Harbor. Once the vessel  
2 arrived at the dive site, its engines and all other mechanical systems were shut down and its crew  
3 of two persons waited in the wheelhouse for instructions from PMT to proceed back to Sumay  
4 Cove.

5  
6 For these and the reasons detailed below, Barrineau's claims of unseaworthiness,  
7 maintenance and cure, negligence, negligence per se, and negligence under the doctrine of res  
8 ipsa loquitur asserted against Cabras have no merit. Summary judgment is appropriate on all  
9 counts.

## 10 **II. BACKGROUND**

### 11 **A. Barrineau's Alleged Injury.**

12 The evidence is undisputed that on May 22, 2005, Barrineau was employed as a  
13 commercial diver by PMT. Ex. A, Response to Interrogatory No. 1. On that day, PMT  
14 assembled a dive team to conduct dive operations on the M/V Hauge, a Military Sealift  
15 Command ship anchored at Inner Apra Harbor, Guam. In particular, PMT had a contract to  
16 clean the bottom of the Hauge's hull. To accomplish this divers would enter the water and use a  
17 power operated "scrubber" to clean the hull. Since the M/V Hauge was not berthed at a shore-  
18 side facility, PMT had to hire a water taxi to transport its divers and equipment to and from the  
19 Hauge. PMT selected the M/V *Cajun*, owned by Cabras, for this purpose and paid Cabras a  
20 daily rental for each day PMT worked on the Hauge. Ex. B at 22:6-13.

21  
22  
23 PMT, on its own initiative, approached Cabras about hiring one of its water taxis or work  
24 boats to transport its divers and equipment to and from the Hauge. When PMT went to Cabras  
25 for this purpose PMT was familiar with Cabras' fleet and had a particular vessel in mind, the  
26 M/V PATRIOT. However, Cabras told PMT that the PATRIOT was on another job and not  
27

28 <sup>1</sup> Sumay Cove is located at the U.S. Naval Base on Guam.

1 available. Ex. B at 91:8-18. Faced with this situation, PMT made a deliberate decision to hire  
 2 the *CAJUN* instead of the PATRIOT even though PMT knew the PATRIOT was a bigger vessel,  
 3 Ex. B at 91:16-18, 22-24., and thus more suitable for the task at hand. Cabras did not insist that  
 4 PMT use the *CAJUN* nor in any way influence PMT's choice of the *CAJUN* for the work PMT  
 5 had contracted to do. Ex. B at 91:25, 92:1-4. Ken Collard, PMT President, personally  
 6 negotiated for the hire of the *CAJUN* and personally made the decision to utilize the *CAJUN*.  
 7 Ex. B at 79:4-16.<sup>2</sup> Except for the *Cajun* itself, PMT "owned all the equipment necessary for the  
 8 underwater mission of the cleaning of the hull." Ex. B at 21:19-21.

10 PMT President Mr. Collard testified in great detail regarding PMT's dive operations and  
 11 the particular equipment involved and that he personally turned off the wrong air supply valve.  
 12 See Ex. B generally.<sup>3</sup> During dive operations, a diver's air is supplied by a color-coded  
 13 "umbilical cord" comprised of an air hose and an underwater radio communications line. Since  
 14 more than one umbilical cord is in use at any given time,<sup>4</sup> the umbilicals are color-coded white  
 15 and black and are matched to a corresponding white or black divers "hat" or mask. The  
 16 umbilicals are hooked up to a supply "volume tank" which is supplied air by PMT's main air  
 17 compressor. Ex. B at 13:6-25. The supply valves on the volume tank, referred to as "quarter-  
 18 turn" valves, likewise are color coded white-black. Ex. B at 47:6-48:3. The set-up is then white  
 19 quarter-turn valve, white umbilical cord, white diver's mask, and the same for color black.  
 20 However, on the day of the incident, PMT made a mistake. Instead of white quarter-turn valve  
 21

23 <sup>2</sup> PMT made the decision to continue the dive cleaning operations even in spite of feeling "cramped" on the work  
 24 deck of the *CAJUN*. Ex. B at 81:24 - 82:2, 89:16 - 90:8, 91:22 - 92:3. PMT was aware of the size capacity of the  
 25 *Cajun before* it hired the boat and thus *before* commencement of diving operations. Ex. B at 91:3-7. PMT also  
 never told Cabras that it felt cramped on the *CAJUN*. Ex. B at 88:17-20.

26 <sup>3</sup> Though throughout this motion there are citations to particular pages in Mr. Collard's deposition transcript (Ex. B),  
 27 the entire transcript is provided in that the overall content is pertinent to the issue raised in this motion and will assist  
 the Court in deciding the motion.

28 <sup>4</sup> Even if only one diver is in the water, a stand-by or safety back-up diver is at the ready with a full complement of  
 gear, including an umbilical cord.

1 to white umbilical to white mask, the white umbilical was mistakenly hooked up to the black  
 2 mask, and vice-versa for the black valve and black umbilical which were hooked up to the white  
 3 mask. In other words, Barrineau's mask and umbilical were mis-matched. Ex. B at 14:1-20.<sup>5</sup>  
 4 Likewise for the stand-by diver, whose mask and umbilical cord were mis-matched. See Ex. C at  
 5 14:23 - 15:11.  
 6

7 PMT's dive operations were under the command of PMT's Dive Superintendent Carey  
 8 Rose, who, as the undisputed record shows, had the sole and ultimate responsibility of  
 9 controlling the air compressor and the regulator regulating the pressure into the volume tank, as  
 10 well as the volume tank itself. Ex. B at 9:10-25, 10:1-6, 28:1-25, 29:20-25. Unaware that the  
 11 masks and umbilicals were mismatched, Mr. Collard turned off Barrineau's air supply by turning  
 12 off the valve he believed to be supplying air to the stand-by mask. Ex. A, Response to  
 13 Interrogatory No. 5; Ex. B at 8:5-9, 16:6-14, 30:6-24; Ex. C at 16:15-19.<sup>6</sup> Responsibility for  
 14

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15  
 16 <sup>5</sup> It is uncertain which color of umbilical was connected to Barrineau. Said another way, the record does not reveal  
 17 whether Barrineau was wearing a black mask or a white one, nor does Mr. Barrineau himself recall, but the absence  
 18 of this fact is irrelevant because the incident occurred when air to Barrineau's mask was shut off when the intention  
 19 was to shut off the air supply to the stand-by diver's mask. PMT President Ken Collard intended to shut off the air  
 20 supply to the stand-by mask (the stand-by diver was still on board not in the water) because the regulator on that  
 21 mask needed to be repaired or replaced. Under ordinary circumstances, the stand-by regulator would prevent air  
 22 from flowing to and through the mask unless the stand-by diver sucked on the regular - an "on demand regulator" -  
 23 but in this instance the regulator was not functioning properly and air was flowing through it unabated. Mr. Collard  
 24 intended to shut off the air to the stand-by mask in order to repair or replace its regulator. In doing so he mistakenly  
 25 turned off the air to Barrineau's mask because the colors were mis-matched. See Ex. B at 16:6-17:25.

26 <sup>6</sup> Ken Collard explained the accident as follows:

27 A The mask that was not in use, as it was being hooked up to the second diver  
 28 began -- the regulator began to free-flow, meaning the air would not stop dispersing out of it. A  
 29 regulator, if you are familiar with what a regulator does, it is -- a demand regulator that when you  
 30 breathe in, it's supposed to provide air.

31 This regulator was malfunctioning and it would not stop free flowing of air. So,  
 32 we had to disconnect the air supply line in order to disconnect the regulator and replace it with a  
 33 new one.

34 At that time, the umbilical that was not being used by Mr. Barrineau, the cord  
 35 turn valve that supplies that hat was inadvertently turned off because the hat was mistakenly  
 36 hooked-up to the wrong umbilical.

37 Again, without remembering exactly which hat was -- Mr. Barrineau had, he  
 38 either had the black hat hooked-up to the white umbilical or he had the white hat hooked up with

1 correctly matching the white umbilical to the white mask and the black umbilical to the black  
 2 mask rested solely with PMT. Ex. B at 18:1-13. Coming at it from the other way, PMT has  
 3 admitted that Cabras Marine employees on board the *CAJUN* had nothing to do with ensuring  
 4 that the umbilicals and masks were properly matched. Ex. B: 18-24-25; 19:1. In fact, once the  
 5 boat arrived at the dive site and was tied off by the Cabras crew, the crew waited in the  
 6 wheelhouse of the *CAJUN*, Ex. B at 19:2-12, and were not expected to be involved at all in the  
 7 dive operations. Ex. B at 19:13-17. Indeed, PMT's instructions *were that only PMT personnel*  
 8 *were permitted on the work deck when the dive operations were taking place.* Ex. B at 81:7-23.  
 9 Moreover, PMT had the responsibility to maintain all of its own equipment, and a PMT  
 10 employee was designated on a one-to-one basis to monitor each item of its machinery and  
 11 equipment and ensure that the machinery and equipment, including the air compressor and the  
 12 air volume tank, were in good working order. Ex. B at 26:13 - 27:11, 27:23 - 28:4, 28:17-18,  
 13 28:24 - 29:1, 41:4-15. It is undisputed that PMT's equipment, including the way the valving on  
 14 the equipment was set, functioned properly. Ex. B at 37:24 - 38:6. According to Mr. Collard,  
 15 "[t]here was nothing mechanically unsatisfactory with the working conditions of the any of the  
 16 equipment," and "[b]sides the malfunctioning of the regulator,<sup>7</sup> there was nothing defective of  
 17 any of Pro Marine's equipment." Ex. B at 38:2-4, 21-23 (footnote added). The equipment  
 18 worked as expected, however, as Mr. Collard stated, the "problem laid up in the connection of . .  
 19  
 20  
 21

---

22 the black umbilical.

23 The air was cut off, was shut off and this is when we realized that we have shut  
 24 the -- the mistake was made.

Q Instead of shutting off the air to the unused mask --

A Yes.

Q -- the air to Mr. Barrineau --

A Yes.

26 Ex. B at 16:15 - 17:1-25; *see also* Ex. B at 30:6-24.

27 <sup>7</sup> The functioning of the regulator is only an issue in this case insofar as its leaking precipitated the shutting off of  
 28 the wrong quarter-turn valve.



1 the masks to the umbilical hoses." Ex. B at 38:4-6. No one from PMT, including Rose, believed  
2 or said anything was wrong with the equipment. Ex. B at 18-21.

3 It is undisputed that neither of the two Cabras employees on board the vessel had  
4 anything to do with hooking up or matching the umbilicals and masks. Ex. B at 14:22 - 15:5,  
5 18:24 - 19:2, 22:6-11. The Cabras employees never even touched PMT's equipment, nor were  
6 they permitted in the work area during dive operations. Ex. B at 42:10-19; 81:11-13. In fact,  
7 PMT had no expectation that the Cabras employees would be involved in the diving operation, or  
8 in any rescue operations. Ex. B at 19:9-17, 22:14-15, 35:18-22, 36:3-9, 43:21 - 44:3. PMT also  
9 had no expectation that Cabras would have any obligation to ensure that the PMT employees  
10 were medically fit and trained to do carry out their mission, or that their equipment was set up  
11 properly. Ex. B at 36:25 - 37:6, 75:18 - 76:9. On each of the four and a half days<sup>8</sup> in which  
12 Cabras transported PMT to the Hauge to conduct the dive cleaning operations, Cabras had no  
13 role or responsibility other than shuttling PMT between the dock and the Hauge, and securing the  
14 *Cajun* to the Hauge so that PMT could carry out its diving operations. Ex. B at 22:14-15, 22:24 -  
15 23:15, 24:21- 25:11, 32:13-19, 36:10-21. Cabras also had no role once the *Cajun* arrived back at  
16 the dock on the day of the incident. Ex. B at 47:2-5.

17  
18  
19 During this lawsuit, PMT has admitted negligence and causation:

20  
21 *that the cause of the accident involved in this litigation was the*  
22 *conduct of an employee of Pro Marine in negligently turning off*  
23 *the air supply to Mr. Barrineau* while he was involved in a dive.  
24 Pro Marine has never alleged that the accident was the fault of  
25 Cabras Marine. Cabras' sole involvement was the provision of a  
26 vessel to transport Pro Marine's crew and equipment to and from  
27 the project site.

28  

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8 It is important to note that though the project took 4.5 days, Mr. Barrineau's injury occurred on day #2 just a few minutes after the work commenced. Day # 2 was then aborted. Day #1 of the project had seen no diving but had rather been a day of mobilization and mapping out the underwater work

1 See Aff. of Thomas C. Sterling in Support of Mot. for Approval of Good Faith Settlement, ¶ 2  
2 (emphases added).

3 B. Procedural Facts

4 Barrineau alleges five counts against Cabras: unseaworthiness, maintenance and cure,  
5 negligence, negligence per se, and negligence res ipsa loquitur.

6  
7 PMT has settled the claims asserted against it by Plaintiff, and on December 21, 2006, the  
8 Court granted PMT's Motion for Summary Judgment on the cross-claim asserted by Cabras. The  
9 only claims remaining in this lawsuit, therefore, are those asserted by Plaintiff against Cabras.

10 **III. LEGAL ANALYSIS AND ARGUMENT**

11 A. Standard for Summary Judgment

12 Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and  
13 admissions on file, together with affidavits, if any, show that there is no genuine issue as to any  
14 material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.  
15 56(c). Here, there is no genuine issue as to any *material* fact and Cabras is entitled to judgment  
16 as a matter of law.

17  
18 B. Cabras is Not Liable for Unseaworthiness.

19 The test for a seaworthy vessel is whether the vessel, crew, and appurtenances and  
20 operation are reasonably fit for the vessel's intended purpose. *Mitchell v. Trawler Racer, Inc.*,  
21 362 U.S. 539 (1960). The standard is not absolute perfection, but rather reasonable fitness for  
22 her intended service. *Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944). Here, there is no  
23 allegation or dispute that the vessel owner did not maintain the *CAJUN* in a condition  
24 reasonably fit for its intended mission, that is, transporting PMT employees from the dock to the  
25 dive site and back.  
26  
27  
28



1 Unseaworthiness is a condition of the vessel that arises from defective gear,  
2 appurtenances in disrepair, or an unfit or improperly manned crew. *Usner v. Luckenbach*  
3 *Overseas Corp.*, 400 U.S. 494, 1971 AMC 277, 281. On the other hand, "isolated, personal  
4 negligent acts" of a co-worker do not render a vessel unseaworthy. *Id.* In *Usner* a longshoreman  
5 was injured when he was struck by the ship's boom, an incident that had not happened before.  
6 *Id.* at 278. The Supreme Court held that one's personal negligent act does not render the vessel  
7 unseaworthy. *Id.* at 282. See also *Mitola v. Johns Hopkins Univ. Applied Physics Lab.*, 839 F.  
8 Supp. 351, 358 (D. Md. 1993) ("a single negligent act committed by an otherwise competent  
9 crew member cannot render a ship unworthy"). Unlike an isolated act, a negligent act must be  
10 "pervasive" and repeated frequently for it to constitute an unseaworthy condition. *Daughdrill v.*  
11 *Ocean Drilling & Exploration Co.*, 709 F. Supp. 710 (E.D. La. 1989).

12  
13  
14 By Plaintiff's own admission, his injuries were not caused by a *condition* of the vessel,  
15 but rather Mr. Collard's "intentionally turning off an air supply valve which directly controlled  
16 Plaintiff's own source of air while he was under water." Ex. A, Response to Interrogatory No. 5.  
17 While *Usner* and *Mitola* distinguish between unseaworthy conditions and negligent acts, the fact  
18 that Mr. Collard has committed an intentional act signifies that his conduct does not render the  
19 entire vessel unseaworthy. Mr. Collard's act was isolated; there is no evidence that the same act  
20 has been committed by any other PMT employee, and certainly by no Cabras employees, whom,  
21 as earlier noted, had no role in the dive operations except to transport the *Cajun* to the Hauge and  
22 back to the dock and were not permitted in the work area. The lack of pervasiveness of the  
23 switching of the valves or the turning off of air supply demonstrates that it was not a condition of  
24 the vessel, and certainly not a condition created or controlled by Cabras. Indeed, Plaintiff has  
25 emphatically stated the precise cause of the accident as follows: "*What difference does it make*  
26 *which color coded umbilical was put on what hat ?! All one has to do is follow the hose into*  
27  
28

1 *the water and figure it out."* Ex. C, Ex. A, (written accident report/statement of Mr. Barrineau)  
2 (emphases added). When given the opportunity to expand on his written statement during  
3 deposition, Mr. Barrineau testified as follows:

4 A: If there are two umbilicals, one is in the water, one is on the  
5 deck of a fairly small vessel, before any valves are shut- off, any  
6 valves that especially might not be marked, follow the umbilicals  
7 on the deck first from the valve. And, the one that goes from the  
8 valve inside the water will probably have the diver on the other end  
9 of it. The one that's on the deck of the boat with the hat is  
10 probably the one that's there no diver, so.

11 [...]

12 Q: Okay. And your answer to my previous question when you  
13 said, all one would have to do is follow the umbilical that goes to  
14 the man in the water, and follow the one that goes to the dive suit  
15 or equipment that's on the deck, then one would know not to shut-  
16 off the valve that controls the hose going into the water.

17 A: Correct

18 Ex. C at 14:1-10, 23-25, 15:1-11. There is no genuine dispute over the fact that PMT had the  
19 sole and ultimate responsibility to ensure that the valve leading to the diver, Mr. Barrineau, was  
20 not shut-off.

21 Moreover, the equipment used by PMT was not defective, in that it operated properly and  
22 as expected. The incident is solely attributable to Mr. Collard mistakenly turning off the valve  
23 connected to Barrineau's air supply when he intended to shut-off the air supply to the free-  
24 flowing regulator for the stand-by diver. Had Mr. Collard not made this mistake, nothing would  
25 have happened to Mr. Barrineau. Likewise beyond dispute is that Mr. Collard was PMT's  
26 President and not a Cabras employee. Cabras had absolutely no control over PMT's personnel or  
27 equipment, and therefore did not create any unseaworthy condition by asserting indirect or direct  
28 control over PMT's own dive operations and its divers. To the contrary, recall that only PMT  
employees were permitted on the work deck of the *Cajun* where the dive operations were being

1 conducted.

2 The undisputed evidence shows that the *Cajun* was entirely seaworthy. The boat worked  
3 as intended, that is, transporting PMT to and from the dock and the Hauge. There was nothing  
4 pervasively defective about Cabras' role in the operations and nothing pervasively defective  
5 about the *Cajun*. On the other hand, the record is replete with admissions by PMT and Mr.  
6 Barrineau that PMT's negligence in "not following the hose connected to the diver" before  
7 shutting off any valve was the sole cause of Barrineau's injuries, and that Cabras had no role in  
8 causing those injuries. Summary judgment on the claim of unseaworthiness is therefore proper.

10 C. Maintenance and Cure

11 The right to maintenance and cure arises out of the employment relationship. In  
12 determining who is the employer with respect to liability for maintenance and cure, the same  
13 criteria apply as those applicable in determining liability under the Jones Act. *Fink v. Shephard*  
14 *S.S. Co.*, 337 U.S. 810 (1948). Under the Jones Act, if there is no employment relationship  
15 between the owner of the vessel and the plaintiff, the owner has no maintenance and cure  
16 liability. *Callan v. Cope*, 165 F.2d 703, 704 (9th Cir. 1948). Courts uphold this standard even if  
17 the owner has a share in the profits from the particular voyage, *id.*, oiled the vessel's engine, *id.*,  
18 or paid for the vessel's fuel and all maintenance and repairs, *Solet v. M/V Capt. H. V. Dufrene*,  
19 303 F. Supp. 980, 982, 987-88 (E.D. La. 1969).

21 There is no dispute that PMT employed Barrineau, and that Barrineau was never  
22 employed by Cabras. See Ex. D, Response to Interrogatory No. 2. Accordingly, only PMT--and  
23 not Cabras--has liability to pay for Barrineau's maintenance and cure, assuming any is due to Mr.  
24 Barrineau in the first place.

26 D. Cabras is Not Liable for Negligence.

27 In admiralty cases, to prevail on a negligence action, a plaintiff must demonstrate that a  
28

1 defendant's act or omission played a substantial part in bringing about an injury.<sup>9</sup> *Benefiel v.*  
2 *Exxon Corp.*, 959 F.2d 805 (9<sup>th</sup> Cir. 1992); *American River Transportation Co. v. Kavo Kaliakra*  
3 *SS*, 148 F.3d 446, 450 (5<sup>th</sup> Cir. 1998). In other words, a defendant's act cannot be a substantial  
4 factor if the plaintiff's harm would have occurred without it. Also, a plaintiff must demonstrate  
5 proximate causation, by showing that the injury or damage is a reasonably probable consequence  
6 of the defendant's act or omission.  
7

8 There is no evidence to show that Cabras played any part, let alone a substantial part, in  
9 bringing about Barrineau's injuries. Instead, the evidence unequivocally shows that Cabras had  
10 absolutely no role in handling PMT's equipment, monitoring or utilizing the air supply valves or  
11 which diver was hooked up to which umbilical, closing the air supply valves or directing  
12 Barrineau or any other PMT employee how to their job. Cabras' sole responsibility was to  
13 provide the vessel and to transport PMT to the Hauge so that it could carry out its dive cleaning  
14 operations. Cabras' employees were nowhere near the incident and nowhere near the air supply  
15 equipment when the incident occurred. Cabras therefore did not have any part, let alone a  
16 substantial part in bringing about Barrineau's injuries. Moreover, as already noted, both PMT  
17 and Barrineau acknowledge that the sole cause of the incident was PMT's failure to "follow the  
18 hose" and figure out which hose had a diver on the end of it before turning off any air supply  
19 valve.  
20  
21

22 Because Barrineau cannot prove the essential element of causation for his claim of  
23 negligence, this claim of negligence must fail.

24 E. Cabras is Not Liable for Negligence Per Se.

25 In support of his negligence per se claim, Barrineau claims that Cabras has violated U.S.

26  
27 <sup>9</sup> Because it is undisputed that Mr. Barrineau was an employee of PMT not Cabras it is likewise beyond dispute that  
28 no Jones Act cause of action can be maintained against Cabras. It follows that the liberal causation standard under  
the Jones Act, defined as negligence which plays even the slightest part in causing the harm, is not applicable here.  
Rather, the standard is "substantial cause."

1 Navy Diving Manual 6-8.3, 6-12, and 8-7.2.1. The U.S. Navy Diving Manual, as its name  
2 indicates, however, is not a rule, regulation, code or statute. Rather it is a "general guide for  
3 planning diving operations." *See U.S. Navy Diving Manual, available at [http://](http://www.coralspringsscuba.com/miscellaneous/usn_manual.htm)*  
4 *www.coralspringsscuba.com/miscellaneous/usn\_manual.htm*. In other words, as a guide, it does  
5 not have the force of law. The claim itself is desperate and *per se* absurd because Cabras was not  
6 conducting any diving operations or supplying even one piece of dive equipment for the  
7 operation. Also, PMT did not in any event consider itself bound by the manual. *See* Ex. B at  
8 52:18-19. Barrineau understandably has not pointed to a single rule, regulation, code or statute  
9 that Cabras has violated or for that matter which even applies to Cabras. Summary judgment in  
10 favor of Cabras is therefore appropriate on this claim.

11  
12 F. Cabras is Not Liable for Negligence Res Ipsa Loquitur.

13  
14 To invoke the doctrine of res ipsa loquitur, the following three elements must be  
15 established: (1) an injury-producing event of a kind that ordinarily does not occur in the absence  
16 of someone's negligence; (2) the event is caused by an agency or instrumentality within the  
17 exclusive control of the defendant; and (3) the event must not have been due to any voluntary  
18 action or contribution on the part of the plaintiff. *Reber v. U.S.*, 951 F.2d 961, 964 n.1 (9th Cir.  
19 1991).

20  
21 Here, Plaintiff cannot rely on negligence / res ipsa loquitur because he is unable to  
22 establish even one of the elements. The undisputed facts demonstrate that Mr. Collard's actions  
23 and the air supply equipment were not within the exclusive control (or any control) of Cabras.  
24 Mr. Collard, who turned off Barrineau's air supply, was not a Cabras employee but rather  
25 President of PMT. PMT - and only PMT - determined how the dive operations would be  
26 conducted. PMT - and only PMT - set up the diving equipment. PMT - and only PMT - turned  
27 off Barrineau's air supply. PMT - and only PMT - was obligated to make sure the air supply  
28

1 hose that was turned off did not have a diver attached to the end of it.

2 Cabras, on the other hand, had no control (or right of control) over PMT's equipment, and  
3 did not even touch PMT's equipment. Cabras did not direct Barrineau or PMT on how to  
4 conduct its dive operations. During the dive operations, Cabras' employees were to remain out  
5 of the work/diving area, per PMT's instructions. Ex. B at 42:10-19, 81:11-13. The undisputed  
6 record shows that Cabras had absolutely no control, let alone exclusive control, over PMT's  
7 activities.  
8


9 Without any genuine evidence of fact that Cabras exercised exclusive control over the  
10 dive operations, Barrineau's res ipsa loquitur claim must fail.

11 **IV. CONCLUSION**

12 Barrineau has settled his claims with the party that acknowledges sole responsibility for  
13 his injuries, PMT. Barrineau's claims of unseaworthiness, maintenance and cure, negligence,  
14 negligence per se, and negligence under the doctrine of res ipsa loquitur are unsustainable in  
15 light of the undisputed facts that Barrineau's injuries were solely attributable to the actions of his  
16 employer, PMT. Summary judgment in favor of Cabras is therefore appropriate on all claims.  
17

18 DATED: Hagåtña, Guam, April 5, 2007.

19 CARLSMITH BALL LLP

20   
21 DAVID LEDGER  
22 Attorneys for Defendant  
23 Cabras Marine Corporation  
24  
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27  
28

**DECLARATION OF DAVID LEDGER**

I, DAVID LEDGER, declare under penalty of perjury that the following statements are true and correct:

1. I have personal knowledge of the facts stated in this declaration except as otherwise indicated.

2. I would testify competently as to these facts if called by the Court.

3. I am licensed to practice law before all courts in the Commonwealth of the Northern Mariana Islands and am admitted to this Court.

4. I am an attorney for Defendant Cabras Marine Corporation.

5. Attached hereto as Exhibit A is a true and correct copy of Plaintiff's Responses to Defendant Pro Marine Technology's First Set of Interrogatories Propounded to Plaintiff.

6. Attached hereto as Exhibit B is a true and correct copy of the transcript of the deposition of Kenneth Collard.

7. Attached hereto as Exhibit C is a true and correct copy of pertinent pages of the transcript of the deposition of John Barrineau.

8. Attached hereto as Exhibit D is a true and correct copy of Plaintiff's Responses to Defendant Cabras Marine Corporation's First Request for Answers to Interrogatories to Plaintiff.

I declare under penalty of perjury that the foregoing is true, correct and complete.

Executed this 5th day of April, 2007 at Hagåtña, Guam.

  
DAVID LEDGER



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on the 5th day of April 2007, I will cause to be served, via electronic filing/service, a true and correct copy of **DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; MEMORANDUM IN SUPPORT THEREOF; DECLARATION OF DAVID LEDGER; EXHIBITS A-D; CERTIFICATE OF SERVICE** upon the following Counsels of record:

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DATED: April 5, 2007.

  
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DAVID LEDGER